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No. 98-424

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

National Solid Waste Management Association,
Petitioner,

v.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

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21 pp

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MOTION OF
BFI WASTE SYSTEMS OF NORTH AMERICA, INC.
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of National Solid Waste Management Association for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

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[1] Petitioner has consented to this *amicus* brief. Counsel for Respondents has informed undersigned counsel of record that they do not oppose the filing of the *amicus* brief.

BFI is one of the nation's largest companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. As a collector and transporter of solid wastes, BFI is subject to solid waste "flow control" programs and requirements that were developed subsequent to and despite this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In addition, BFI operates 78 municipal solid waste landfills in the United States that are or can be adversely affected by the implementation of post-*Carbone* economic flow control schemes such as the one at issue in this case.

BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by the Respondents in this case. With all due respect to the parties to this case, BFI believes that its broad, national experience and the perspective it has gained from that experience will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

Respectfully submitted,

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October 13, 1998

No. 98-424

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

National Solid Waste Management Association,

Petitioner,

v.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,

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On Petition for Writ of Certiorari to the
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BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the question presented in the Petition for Writ of Certiorari. In the interest of judicial economy, the question is not repeated here.

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INTEREST OF *AMICUS CURIAE*

BFI Waste Systems of North America, Inc. ("BFI") is one of the largest companies in the world which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical and residential solid wastes. BFI owns or operates a network of 78 municipal solid waste landfills in the United States. Those landfills accept for disposal wastes generated by residences and commercial establishments. BFI owns a landfill in Dakota County, Minnesota that has been affected by the implementation of the challenged Minnesota statute. In addition, BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

REASONS FOR GRANTING THE WRIT

Through an expansive reading of the "market participant" doctrine, the courts below sanctioned a Minnesota statute that requires local governments to adhere to the waste management choices made by counties. The legislation serves no legitimate environmental purpose; because it discourages landfilling, it acts merely to ensure the flow control of solid waste to facilities such as incinerators. A state statute that requires local governments to adhere to county solid waste management plans, in the absence of any state funding for local "purchasing" activities, should not fall within the scope of the market participant doctrine. The decision below encourages circumvention of *Carbone* by the simple guise of state-level market participation.

The fiction of market participation in the absence of any financial involvement has consequences that may extend far beyond Minnesota. Review by this Court is necessary to ensure that *Carbone* is not rendered, through similar solid waste management "planning" statutes, a constitutional nullity. In addition, the obvious inconsistencies in the judicial rulings regarding the scope of the market participant doctrine (as described in the Petition for Writ of Certiorari) justify this Court's review.

THE MINNESOTA STATUTORY SCHEME FAILS TO PROMOTE A LEGITIMATE ENVIRONMENTAL OBJECTIVE; EXISTING FEDERAL AND STATE RULES FOR MUNICIPAL SOLID WASTE LANDFILLS ESTABLISH PROTECTIVE STANDARDS.

The Minnesota statute upheld by the Eighth Circuit Court of Appeals (Minn. Stat. Section 115A.46, subd. 5)) has had the effect of precluding any meaningful use of landfilling as a waste management method, particularly when applied in conjunction with the 1980 waste "hierarchy" provision (Minn. Stat. Section 115A.02(b)). The prohibition against landfilling condemns local governments to utilize more expensive waste treatment methodologies. Moreover, while there may have been a rational environmental justification in 1980 for disfavoring landfilling through a statutory scheme that essentially ensures the "flow control" of waste to incinerators and composting facilities, no legitimate reason now exists for perpetuating such costly, inefficient, and uncompetitive requirements. Federal standards, set forth at 40 C.F.R. Part 258 (1997), which have been incorporated into Minnesota rules and permit conditions, establish criteria fully protective of human health and the environment. Landfilling today is as environmentally sound as any type of "processing" favored by the Minnesota legislation and insisted upon by county waste management plans.

The Part 258 standards were adopted in 1991 after extensive analysis by the U.S. Environmental Protection Agency ("EPA") of the risks presented by substandard facilities. The Federal criteria were promulgated in accordance with Congress's insistence in 1984 that EPA standards "be those necessary to protect human health and the environment". Section 4010(c) of the Resource Conservation and Recovery Act provides that if a particular form of regulatory control is necessary to "protect human health and the environment", reduced levels of protection should not be tolerated. Congress was aware that--in one year alone--at least 500 municipal landfills violated state groundwater protection standards, 845 violated state air standards, and at least 600 were formally cited for having contaminated surface water. Out of 163 documented case studies, 146 landfills were actively contaminating groundwater and 73 landfills were contaminating surface water. In 1986, the EPA estimated that only fifteen percent of all municipal solid waste landfills had liners, only five percent had leachate collection systems, and only twenty-five percent had groundwater monitoring systems. 53 Fed. Reg. 33,319 (1988). Similarly, the congressional history is replete with examples of ground and surface water contamination resulting from the operation of poorly designed and maintained landfills. *See, e.g.*, H.R. CONF. REP. No. 1133, 98th Cong., 2d Sess. 116-17, reprinted in 1984 U.S.C.C.A.N. 5, 678-88.

Moreover, the Congress clearly desired--indeed, it intended--the closure of substandard facilities. Congress noted that "(t)he underlying standard for facilities subject to this amendment to Subtitle D remains protection of the environment." 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984). As then-Senator Randolph noted, individual facilities might suffer hardship--and possibly close--if they cannot meet requirements deemed necessary and practicable for the industry as a whole: "New statutory requirements for Subtitle D facilities may hasten the closure of many solid waste facilities that have

only a few years of remaining capacity. The requirements could also hasten the closure of facilities with substantial capacity, but that are either unable or unwilling to accept new regulatory costs." *Id.*

The Part 258 regulations fulfilled Congress's expectations, by establishing risk-based criteria that, in the EPA's words, "ensure that municipal solid waste landfills are operated and designed to safely manage household hazardous waste and conditionally exempt small quantity generator waste. . . ." 58 Fed. Reg. 46,923 (Sept. 3, 1993). In releasing the rules, the EPA noted that the Federal requirements "will increase public confidence that landfills are designed to protect human health and the environment", protect "property values located within the vicinity of new landfills", safeguard "the existence value of ground water near landfills", and minimize "the need for future cleanups" in order to reduce "the potential impacts on future generations (or the federal government, as in the case of a Superfund site)." *Id.*

Moreover, the Agency stressed that "the final rule, by more fully reflecting the cost of safe waste disposal, will also lead to more responsible waste management practices and promote resource conservation." *Id.* at 50,986. The EPA agreed "that regionalization of solid waste management in rural areas, employing larger, better located, designed and operated MSWLFs [Municipal Solid Waste Landfills], is preferable to continued use of small, poorly planned facilities that may pose health and environmental threats to their communities." *Id.*

In developing the Federal requirements, the EPA also emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities." *Id.* at 50,989.

The Federal rules contain stringent requirements regarding liners, leachate collection systems, corrective action for closure and post-closure care, and financial assurance. 40 C.F.R. §§258.40-70. In addition, limitations are placed on the location of facilities near airports and in floodplains, unstable areas, wetlands, seismic impact zones and fault areas. Affected existing facilities must either make a demonstration of no adverse impact or close in accordance with the regulations. 40 C.F.R. §§258.10-16.

Other provisions of the regulations include restrictions on public access to the landfill, daily cover requirements to minimize disease vector and other problems, methane gas controls to prevent gas explosions, controls on runoff from the facility to prevent releases to surface and ground water resources, and restrictions on the landfilling of certain wastes, including hazardous waste and liquid wastes, to minimize the toxicity and quantity of leachate that may threaten ground water. 40 C.F.R. §§258.20-29.

The following provisions illustrate the significantly increased design, construction, monitoring, and post-closure maintenance responsibilities imposed upon landfill operators. Numerous siting criteria ensure that MSWLFs are located so as to ensure environmental protection and safe operation. For example, under the EPA rules owners/operators of existing MSWLFs and proposed lateral expansions or new MSWLFs located in 100-year floodplains must demonstrate that the landfill "will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in a washout of solid waste". 40 C.F.R. §258.11. Likewise, proposed lateral expansions and new MSWLFs may not be located in wetlands in states without approved programs. Proposed MSWLFs may not be located in approved states, such as Minnesota, unless the owner/operator of the facility can make

demonstrations to the State Director that are essentially equivalent to those under Section 404 of the Federal Clean Water Act. 40 C.F.R. §258.12.

The EPA regulations provide that proposed lateral expansions and new MSWLFs "shall not be located in seismic impact zones" in states without approved programs. Proposed MSWLFs may not be located in seismic impact zones in approved states "unless the owner or operator demonstrates to the State Director that all containment structures, including liners, leachate collection systems, and surface water control systems, are designed to withstand the maximum horizontal acceleration in lithified earth material for the site". The necessary documentation must be placed in the site operating record and the State Director must be notified of its completion. 40 C.F.R. §258.14.

The standards also address the daily operation of facilities. They provide that owners or operators of all MSWLFs must implement a program at the facility for the detecting and preventing the disposal of regulated hazardous waste and PCB waste. The program must include, at a minimum: (1) random inspections of incoming loads unless the owner or operator takes other steps to ensure that incoming loads do not contain regulated hazardous wastes or PCB wastes; (2) records of any inspections; (3) training of facility personnel to recognize regulated hazardous wastes and PCB wastes; and (4) notification to the State Director of an authorized state or the EPA regional administrator if in an unauthorized state if a regulated hazardous wastes or PCB waste is discovered at the facility. 40 C.F.R §258.20.

The rules also require that all MSWLFs must cover disposed solid waste at the end of each operating day with six inches of soil to control disease vectors, fires, odors, blowing litter, and scavenging. Alternative materials of alternative

thicknesses may be approved by the Director of an approved State if the owner or operator shows that the alternative material or thickness will adequately control the concerns listed above without presenting a threat to human health and the environment. 40 C.F.R. §258.21.

Similarly, owners and operators of all MSWLFs must, pursuant to the EPA rules, ensure through compliance with detailed standards that the concentration of methane gas generated by the facility does not pose an explosion hazard. The owner or operator must implement a routine methane-monitoring program. The monitoring shall be performed at least quarterly and if methane gas levels are detected above the levels listed above, the owner or operator must "immediately take all necessary steps to ensure protection of human health and notify the State Director". The owner or operator must also record the methane levels detected within the operating record within seven days of detection. Within 60 days of detection, the owners or operators must implement a remediation plan for the methane gas releases, place a copy of the plan in the operating record, and notify the State Director that the plan has been implemented. The plan shall describe the nature and extent of the problem and propose a remedy. 40 C.F.R. §258.23.

All new MSWLF units and lateral expansions must be constructed with an approved site-specific liner and leachate collection system design. The design must ensure that Maximum Contaminant Levels promulgated pursuant to the Safe Drinking Water Act will not be exceeded in the uppermost aquifer at the relevant "point of compliance" (*i.e.*, the property line or no more than 150 meters from the limits of fill). Alternatively, a composite liner design specified in the regulations may be utilized. The composite liner design must consist of a flexible membrane liner placed directly over at least 2 feet of compacted soil and a leachate collection system designed and constructed to

maintain less than a 30cm depth of leachate over the liner. 40 C.F.R. §258.40.

In addition, the Federal rules establish stringent and detailed standards to ensure protection of groundwater and drinking water supplies. 40 C.F.R. §§258.50-58. The monitoring program must include the installation of monitoring wells (some of which must be installed at the relevant point of compliance) which yield representative groundwater samples from the uppermost aquifer downgradient from the landfill. Periodic sampling for 15 metals and 47 organic compounds must occur; when concentrations are above certain limits, the facility owner/operator must initiate corrective action measures that are protective of human health and the environment, control the source of the release, and properly manage any wastes that are generated.

Owners/operators of all landfills must, under the EPA rules, install a final cover system that is designed to minimize infiltration and erosion. In addition, closure of a landfill unit must be in accordance with a previously approved plan, and the closure activity must be overseen and certified by an independently registered professional engineer. 40 C.F.R. §258.60. Following closure, the owner or operator must record a notation on the deed to the landfill facility property. In addition, all owners/operators must conduct post-closure care for thirty years; the monitoring period may be extended if necessary to protect human health and the environment. 40 C.F.R. §258.61.

Finally, owners/operators are required to maintain financial assurance during all periods of operation and post-closure monitoring for a typical period of thirty years to ensure that the costs of closure and post-closure or remediation are not borne by third parties (*i.e.*, the general public). The rules require that owners/operators establish continuous financial assurance,

using one or more of the methods (such as trust funds, insurance, and letters of credit) approved by the EPA, for the cost of hiring a third-party to conduct closure and post-closure activities. The amount of financial assurance must be adjusted yearly during the active life of the site as well as during the post-closure period to account for inflation as well as any changes in landfill conditions. The extensive EPA requirements make redundant the liability risk obligations contained in the Minnesota legislation (*see* Petition for Writ of Certiorari, at 8 fn. 2). 40 C.F.R. §§258.70-74.

These Federal regulations have led to the closure of hundreds of smaller landfills. Those facilities in operation today meet or exceed the EPA requirements. They provide a cost-effective and environmentally protective means of managing the Nation's solid wastes. Yet the Minnesota statute essentially precludes their use—in order to promote a system of flow control that this Court has already rejected.

THE CHALLENGED LEGISLATION NOW SERVES ONLY ONE PURPOSE: TO PERPETUATE AN UNCONSTITUTIONAL FLOW CONTROL SYSTEM.

The regulatory standards described above did not exist in 1980. Today, however, standards that the EPA has described as fully protective of human health and the environment are firmly in place. Minnesota's applicable solid waste management laws and regulations meet (and, in some instances, significantly exceed) the Federal criteria in stringency. Other EPA and Minnesota provisions are applicable to MSWLFs and expand upon the Part 258 rules. For example, air emissions from MSWLFs are regulated under stringent guidelines established pursuant to the Clean Air Act. 40 C.F.R. Part 60. Leachate produced by MSWLFs must be treated or utilized according to Part 258 or Clean Water Act regulations. *See, e.g.*, 40 C.F.R. §258.28.

The criteria applicable to MSWLFs are in many instances considerably more stringent than the requirements applicable to hazardous waste treatment, storage, and disposal facilities, even though MSWLFs present far fewer potential risks. Whatever environmental justification may have existed nearly two decades ago for disfavoring--much less effectively precluding--landfilling as a legitimate waste management option is no longer present. The landfilling of municipal solid waste is a safe, legitimate management practice. The challenged Minnesota legislation now works simply as an economically counterproductive and constitutionally impermissible flow control scheme.

Regulatory restrictions on landfilling are, moreover, restrictions on the use of privately owned facilities. While only about a quarter of the Nation's landfills are privately owned, the disposal capacity of those landfills is more than half the total permitted capacity. These larger landfills have been designed to comply with the strict Federal standards and their economic viability is dependent upon the receipt of waste from numerous jurisdictions. Obviously, the Minnesota legislation acts as a deterrent to the use of these state-of-the-art facilities, including landfills located outside the State, which are sized and designed to receive wastes from a large number of political subdivisions .

In addition, the challenged statute works to discourage responsible solid waste management planning, at either the state or the local level, through cooperative partnerships among state and local governments, the private sector, and individual citizens. Local governments in Minnesota simply have no choice; they must follow the dictates of county plans, and inevitably must deliver wastes to designated, flow-controlled "processing" (incinerator and composting) facilities.

The mandatory restrictions on the ability of local governments to choose have also led to unjustified higher costs for residential and commercial waste generators within

Minnesota. Because alternative technologies have proven to be more expensive than state-of-the-art landfilling, residents of the State, like those of many other jurisdictions which continue to impose flow control requirements, incur unnecessary costs. They will likely continue to do so in the absence of a judicial determination that the existing legislation is constitutionally impermissible.

REVIEW BY THIS COURT IS NECESSARY TO ELIMINATE THE HIGHER COSTS AND ECONOMIC BALKANIZATION PRODUCED BY THE MINNESOTA STATUTE.

The private sector responded to rapidly rising disposal costs in the 1980's by building more disposal capacity. While the number of landfills in the United States has dropped dramatically, particularly since the Part 258 regulations went into effect, overall landfill capacity has increased. As a result, disposal charges have fallen as landfills compete for business. Yet Minnesota waste generators and local governments cannot take advantage of this cost-effective marketplace. They must instead abide by antiquated county plans that typically continue to rely on "processing" mandates and flow control strategies to assist incinerators and recycling facilities that in many cases require mandatory directed waste flows to be economically viable. Without the challenged legislation and the statutory predisposition against landfilling, local governments and waste generators could avoid higher fees by turning to alternative disposal options both within Minnesota and in other states.

This case presents precisely the type of economic balkanization feared by the drafters of the Commerce Clause. A recent study conducted by the National Economic Research Associates ("NERA") summarized the historical development of flow control mandates:

Flow control refers to local laws by which local governments direct that the municipal solid waste (including residential, commercial, and industrial) generated within their jurisdictions be disposed of and/or processed at designated facilities. Local governments have been imposing such controls at least since the early 1970's, principally for two reasons--to protect sizeable investments in waste facilities and to generate fee revenues to finance solid waste programs. Many local governments built and/or financed large-scale waste management facilities which require substantial minimum waste flows to cover costs. Many of these facilities, for example, are resource recovery plants which operate under contracts to provide steam for industrial processes and electricity generation. Some of these plants would not be economic without these contracts, and the contracts require that they provide a specific amount of stream requiring a specific amount of waste. Consequently, local governments need to direct waste to these plants to protect their investments. In fact, according to the Resource Recovery Yearbook, about 48% of the resource recovery plants constructed since 1964 benefit from flow controls. More recently, local governments have financed and built transfer stations and material recovery facilities. These facilities, especially the latter, also require substantial waste flows to be economic. Public landfills have been less reliant on flow controls, although economies of scale may encourage larger facilities. Some local governments also have turned to flow control to generate fee revenues often used to finance waste

> management programs such as recycling and household hazardous waste. Without flow control, waste generators could avoid such fees by turning to alternative disposal options in other jurisdictions.

National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 2.

Moreover, there has been a pronounced increase in disposal/incineration capacity in many areas of the Nation, including the Midwest. Upgrading and expansions of local sites, a revolution in transportation, and the growth of transfer station infrastructure have all have led to a competitive market in which a community can contract for long-term disposal at very advantageous rates. Private companies are striving to be the low-cost provider in their field. Governments that enter into partnerships with private companies can enjoy financial benefits and still meet their obligations to their constituents.

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide." National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 1-2. Moreover, as the EPA noted, flow control mandates provide no ascertainable environmental benefit. U.S. Environmental Protection Agency, REPORT TO CONGRESS ON FLOW CONTROLS AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 (1995). Given the excessive and burdensome costs of flow control, measures such as the Minnesota legislation stand as significant obstacles to the goal of a non-balkanized economy. This Court is once again presented with the opportunity to confirm and make explicit its ruling in

Carbone. In addition, the obvious conflict in the judicial rulings involving the scope of the market participant doctrine amply justifies this Court's intervention.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one that impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in *Carbone*, state and local governments have continued their efforts to create and sustain protectionist schemes that thwart the free flow of commerce. The Minnesota legislation at issue in this case is yet another example. The statute in question promotes no legitimate environmental goal; its continued application serves merely to ensure, through the fiction of market participation, the flow control of waste to preferred facilities. Such end-runs around *Carbone* threaten the viability of this Court's precedents and the goals advanced by the Commerce Clause. In addition, as Petitioner has demonstrated, in light of the inconsistent rulings on the scope of the market participant doctrine there is a need for clear and unequivocal guidance from this Court on the question presented.

Respectfully submitted,

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